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September 6, 2019

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
The Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Procedure to Address Conceptual Issues Around Non-Allowable Expenses (See Page Number 4 of Order No. 2019-341)
Docket No. 2019-232-A

Dear Mrs. Boyd:

Enclosed for filing in the above-referenced docket, please find Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC.

Please do not hesitate to contact me if you have any questions or require any further information.

Sincerely,

Heather Shirley Smith

Heather Shirley Smith

Enclosure

C: Parties of Record (via email)

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-232-A

IN RE:	)	
	)	**COMMENTS OF**
Procedure to Address Conceptual	)	**DUKE ENERGY CAROLINAS, LLC**
Issues Around Non-Allowable	)	**AND DUKE ENERGY PROGRESS, LLC**
Expenses (See Page Number 4 of	)	
Order No. 2019-341)	)	

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively "Duke Energy" or "Companies") have filed notices of appearance in this docket, opened by the Public Service Commission of South Carolina ("Commission") to address issues relating to non-allowable expenses. This proceeding was originally proposed in a Stipulation filed by the Office of Regulatory Staff ("ORS") and DEP in Docket No. 2018-318-E. The proposal was intended to create a forum for the consideration of whether it would be possible to create more clarity and predictability relating to the consideration of expenses that should not be allowed to be recovered in rates ("non-allowables"). In response to the Stipulation, the Commission initiated this proceeding and issued Order No. 2019-477 requesting comments by September 6, 2019.

Duke Energy welcomes the opportunity to provide comments regarding the issue of what expenses should be disallowed from inclusion in rates. However, decisions from the South Carolina Supreme Court provide instruction on the sorts of guidelines the Commission could establish regarding the treatment of non-allowables:

(1) It is possible for the Commission to establish guidelines that would be applicable to certain categories of costs that should not be passed on to ratepayers, but only for non-controversial

categories (e.g. alcohol, political contributions) that have not presented issues that have had to be resolved by the Commission;

(2) It is not possible for the Commission to establish guidelines that serve as rules as to what can and cannot be included in rates; instead, the law is clear as to the type of analysis required when an expense is contested, and such analysis requires an examination of the specific facts and circumstances giving rise to the expenditures in each case.

Precedent from the South Carolina Supreme Court on Non-Allowables

The most significant decision by the Court on the subject being considered in this docket is *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 422 S.E2d 110 (1992). *Hamm* was an appeal by the Consumer Advocate of orders of the Commission approving new rates for SCE&G. Among the rulings appealed was the Commission's treatment of dues paid by SCE&G to the Edison Electric Institute. The Court found that it was inappropriate for the Commission to rely solely on its past practices in determining what portion of the dues to allow to be recovered in rates:

> *Edison Electric Institute ("EEI") Dues*. There was evidence submitted at the hearing showing a portion of the EEI dues were used for the Institute's lobbying efforts, charitable contributions, and social functions. Other Commissions have disallowed these dues or a portion of them based on these uses. *Re: Hawaiian Electric Co.*, 128 PUR4th 471 (1991); *Re: Louisville Gas & Elec. Co.*, 119 PUR4th 431 (1990). The Commission's order excluded only the portion of these dues which applied to the Institute's Media Communications Fund. The Commission's order noted that the Consumer Advocate argues these dues should be disallowed as they provided no benefit to the rate payers. The order further noted that SCE & G insisted their membership did provide a benefit. The Commission made no findings of fact but concluded there was no reason to vary from its position in prior cases.
>
> The declaration of an existing practice may not be substituted for an evaluation of the evidence. *Butler Township Water Co. v. Pennsylvania Pub. Util. Comm'n,* 81 Pa.Commw. 40, 473 A.2d 219 (1984). **A previously adopted policy may not furnish the sole basis for the Commission's action. *Id.* The Commission must set forth findings which are sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the**

> **evidence and whether the law has been properly applied to those findings.** *Able, supra.* We find this recital of conflicting views followed by a conclusive statement by the Commission inadequate to meet the standards set out in *Able.* We, therefore, remand this issue for further findings consistent with our holding in *Able.*

Hamm, supra, pp. 288-289 (emphasis supplied).

This holding by the Court makes it clear that the Commission cannot promulgate guidelines to justify its treatment of categories of costs in ratemaking proceedings. Instead, the Court will require the Commission to both consider whether specific costs should be recovered and to issue an order explaining its rationale, including analysis of evidence, for its decision in each case.

The *Hamm* decision also described the "presumption of reasonableness" given to a utility's expenses:

> Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence.

Hamm, supra, p. 286 (internal citations omitted, emphasis added). In the more recently decided case of *Utilities Services of South Carolina v. Office of Regulatory Staff,* 392 S.C. 96, 708 S.E.2d 755 (2011) the Court elaborated on the presumption of reasonableness and again emphasized the requirement that the Commission decide issues regarding a utility's recovery of expenses on facts developed in the record:

> Utility is correct that it was entitled to a presumption that its expenditures were reasonable and incurred in good faith, and therefore, a showing that its expenses had increased since its last rate case *could* satisfy its burden of proof. Nevertheless, the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs. It seems to us that Utility wants the presumption of reasonableness to be dispositive.

Utilities Services, supra, p. 109. While the *Utilities Services* decision makes it clear that the presumption of reasonableness is not dispositive, it also carefully scrutinized the record to require that the Commission had a specific basis in the record for its rejection of the presumption:

> Nevertheless, the customer testimony in this case could only have "rais[ed] the specter of imprudence" as to expenditures that Utility claimed to have incurred in neighborhoods where customers alleged no improvements were made. These customers could offer no insight into whether Utility made capital improvements in other neighborhoods. Thus, as discussed below, we hold the PSC erred in failing to accord Utility the presumption of reasonableness as to expenditures that were not called into question by customer testimony or by any other source.

Utilities Services, supra, p. 111.

In looking at these cases, it is clear that the utility's expenses have a presumption of reasonableness, and that a contesting party has a burden to demonstrate why such cost would be imprudent and inappropriate for cost recovery, and the utility has the burden to answer such challenges if it wants the contested costs considered for ratemaking. The *Hamm* and *Utilities Services* cases illustrate how the Supreme Court will require the Commission to base its non-allowable determinations on a close examination of the record and to explain its decisions with careful reference to the facts that it relies on for its decisions. It is not enough for the Commission to rely on past practices or generalized complaints by customers at night hearings. The parties to rate cases have an obligation to develop a full and complete record for the Commission, and the Commission must make its decisions based on that record.

Duke Energy Recommendations

The Companies recognize that this proceeding was initiated by a request from the ORS that arose during the course of litigating rate cases by DEC and DEP and notes the Companies agreed that the treatment of non-allowables in rate cases was an appropriate matter for an administrative docket. Duke Energy will carefully consider any recommendations from the ORS or other

stakeholders on possible guidelines that may be helpful to the ORS or others as they conduct examinations and discovery of companies that file rate cases to recover expenses in rates, and would ask the Commission to allow for responsive comments once all interested parties file initial comments. While, as discussed above, the Companies believe that strict guidelines by cost category won't be lawful to the Commission in discharging its duty in deciding contested, difficult issues as outlined by the Supreme Court, any guidelines that can provide structure to these types of arguments in rate cases would be helpful, especially given the huge quantity of information produced during a rate case.

The Companies believe that at a minimum the guidelines the Commission should establish on this matter should be consistent with the Supreme Court cases cited above and the requirement for prefiled testimony of S.C. Code of Regulations R. 103-845(C). The Companies recommend that the guidelines should include the following:

(1) Parties proposing any utility cost disallowance should provide a robust and fulsome explanation for the basis of its recommendation, put forth in prefiled direct testimony by a person qualified to assess the facts and circumstances necessary to make such recommendation, including assertions (if any) regarding why such cost was unreasonable or imprudently incurred, and any documentation relied upon in making such determination; and

(2) In response to testimony advocating a disallowance the utility should, either provide a concession that it no longer seeks such specific cost item to be include in the rate setting process in that case, or a robust and fulsome explanation from a qualified utility representative provided in prefiled rebuttal testimony as to why such cost is appropriate for rate making.

The Companies appreciate the opportunity to provide these comments. They also believe that it will be helpful to the Commission if all parties to this docket are given a further opportunity to respond to comments filed by other parties in this docket.

Dated this 6th day of September, 2019.

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& Duke Energy Progress, LLC

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2019-232-A

IN RE:	)
	)
Procedure to Address Conceptual	)
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Expenses (See Page Number 4 of	)
Order No. 2019-341)	)

This is to certify that I, Toni C Hawkins, a paralegal with the law firm of Robinson, Gray Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) name below the **Comments of Duke Energy Progress, LLC and Duke Energy Carolinas, LLC** in the foregoing matter via electronic mail as follows:

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Dated this 6th day of September, 2019.

Toni C. Hawkins